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10  
11 **UNITED STATES DISTRICT COURT**  
12 **DISTRICT OF NEVADA**

13 CLARK COUNTY NEVADA,

14 Plaintiffs,

15 vs.

16 ORBITZ WORLDWIDE, LLC., et al.

17 Defendants.

Case No.: 2:21-cv-1328-JCM-VCF

Dept. No.: 14

**PLAINTIFF'S RESPONSE TO  
DEFENDANTS' MOTION TO DISMISS**

18 Plaintiff, Clark County Nevada, by and through counsel of record, of the law firm of Clark  
19 Hill, PLLC, and hereby submits its Response to Defendants' Motion to Dismiss [Dkt 13].

20 This response is made and based upon all the pleadings and papers on file herein, the  
21 attached points and authorities, in conjunction with such evidence and further authorities as the  
22 court may require at the time this matter is considered.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I.**

25 **THE COURT LACKS SUBJECT MATTER JURISDICTION TO CONSIDER THIS**  
26 **MOTION**

27 Plaintiff originally filed this matter in the Eighth Judicial District Court in and for Clark  
28 County, Nevada on May 14, 2021. Defendants filed a Notice of Removal of the action to this

1 Court on July 13, 2021. [ECF1]. Plaintiff has challenged the removal based upon the lack of  
2 complete diversity and failure to satisfy the \$75,000 amount in controversy for each removing  
3 Defendant by filing a Motion to Remand. [ECF 9] While briefing has been completed with respect  
4 to Plaintiff's Motion for Remand, the Court has not yet ruled upon that Motion.

5  
6 Plaintiff is required to file an Opposition to the instant Motion to Dismiss or face the  
7 possibility that said Motion will be granted as unopposed. For the reasons set forth in ECF 9 and  
8 ECF 12, which are incorporated herein by reference, this Court lacks subject matter jurisdiction  
9 to rule on the instant Motion.

10 This opposition addresses the merits of the Motion but is not a waiver of its arguments that  
11 the case should be remanded to the Eighth Judicial District Court. Plaintiff reserves all rights set  
12 forth in its Motion to Remand.

## 13 II.

### 14 THE EXCLUSIVE REMEDIES DOCTRINE IS NOT APPLICABLE TO THIS CASE

15 The Exclusive Remedies Doctrine is not applicable to this case. Notwithstanding its  
16 inapplicability, Defendants seek the dismissal of Plaintiff's third, fourth, fifth, sixth and seventh  
17 causes of action<sup>1</sup> for conversion, breach of fiduciary duty, unjust enrichment, constructive trust  
18 and violation of the Nevada deceptive trade practices act, respectively, through application of  
19 this doctrine. Defendants incorrectly assert that Plaintiff is trying to "make an end-run around its  
20 own taxing scheme and remedies, by seeking to enforce the Lodging Tax via "tagalong" tort and  
21 fraud claims." See Motion [ECF 13] at 5:6-8.

22  
23 What Plaintiff is actually doing in this litigation is making a claim for unpaid taxes pursuant  
24 to violation of Clark County Code Ordinances (i.e. First and Second Claims for Relief) and  
25 combining those claims with other claims arising under common law and/or statute. Defendants'  
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<sup>1</sup> The Complaint inadvertently identifies two different causes of action as its "Fifth Claim for Relief." Correcting for this typographical/ministerial error, Plaintiff's Fifth Claim for Relief is for unjust enrichment, its Sixth Claim for Relief is for constructive trust and its Seventh Claim for Relief is for violation of the Nevada deceptive trade practices act

1 real argument, stripped of its hyperbole regarding the exclusive remedies doctrine, is that Clark  
2 County Ordinances Chapter 4.08 abrogates otherwise available common law and statutory rights  
3 and remedies if the subject matter of the lawsuit somehow involves claims of unpaid transient  
4 lodging taxes. Citing an 1879 case (i.e. *State v. Yellow Jacket Silver Mining Co.*, 14 Nev. 220, 225  
5 (1879)), a 1902 case (i.e. *State v. Nev. Cent. R. Co.*, 26 Nev. 357, 68 P. 294, 295 (1902)) and  
6 *Republican Attorneys Gen. Ass'n v. Las Vegas Metro. Police Dep't*, 136 Nev. 28, 31–32, 458 P.3d  
7 328, 332 (2020), Defendants broadly assert that the exclusive remedies doctrine “provides that  
8 when a statute creates a remedy, it is exclusive of all common law remedies.” See Motion [ECF  
9 13] at 5:10-14.

11 Interestingly, none of the cases cited by Defendants even mention an “exclusive remedies  
12 doctrine” and they do not purport to have the broad implications urged by Defendants. *Republican*  
13 *Attorneys Gen. Ass'n v. Las Vegas Metro. Police Dep't*, 136 Nev. 28, 31–32, 458 P.3d 328, 332  
14 (2020), for instance, involved the issue of whether the Nevada Public Records Act (NPRa), which  
15 generally requires the disclosure of public records, “explicitly yields to the statute barring the  
16 release of confidential juvenile justice information.” (emphasis added). To the extent there is  
17 uniformity in cases involving the exclusive remedies doctrine in Nevada, it seems to apply only  
18 when a statute sets forth a new regulatory framework and the legislation explicitly or by necessary  
19 implication provides that the remedies and/or procedures set forth therein are exclusive to all other  
20 remedies set forth under common law or other pre-existing statutes. In other words, the legislation  
21 itself must clearly and completely preempt an entire subject matter from other statutorily created  
22 or available common law remedies.

25 Defendants’ arguments regarding its alleged “exclusivity doctrine” simply compare  
26 “apples and oranges.” The “exclusivity doctrine” referred to by Defendants relates to expansion  
27 of statutory remedies by interpretation where there is no explicit intent for that expansion.  
28

1 The doctrine as stated in *Yellow Jacket* does not reach common law remedies unless the intent to  
 2 supplant those existing remedies is clear. Thus, the exclusivity doctrine to which Defendants refer  
 3 involves expansion by interpretation of newly created statutory remedies: i.e., the apple. And it  
 4 does not of itself relate to abrogation of existing common law remedies unless there is a clear  
 5 legislative intent to pre-empt: i.e., the orange. Here, assertion of common law remedies along  
 6 with the statutory claim is clearly allowed as explained *infra*.

8 The Nevada Supreme Court has been very clear that abrogation of common law remedies  
 9 and actions must be supported by clear legislative instruction to do so in the enabling legislation.  
 10 See *First Fin. Bank v. Lane*, 130 Nev. 972, 978, 339 P.3d 1289, 1293 (2014): “This court will not  
 11 read a statute to abrogate the common law without clear legislative instruction to do so.” Citing  
 12 *Orr Ditch & Water Co. v. Justice Court of Reno Twp., Washoe Cnty.*, 64 Nev. 138, 164, 178 P.2d  
 13 558, 570 (1947). Further, the Nevada Supreme Court has expressly held that the creation of an  
 14 affirmative statutory remedy does not abrogate common law remedies absent explicit restrictive  
 15 language doing so.

17 If a statute gives a remedy in the affirmative, without containing any express or  
 18 implied negative, for a matter which was actionable at common law, this does not  
 19 as a rule take away the common-law remedy, but the party may still sue at  
 20 common law as well as upon the statute. In such cases the statute remedy is  
 21 regarded as merely cumulative. 1 R. C. L. 323, 324; 1 C. J. 988, 989, 990, 991,  
 1003, 1004; Pomeroy's Code Remedies (Fifth Edition) §§ 8, 9, 13; Hulley v.  
 Chedic, *supra*.

22 *Cann v. George B. Williams Land & Livestock Co.*, 56 Nev. 242, 48 P.2d 887,  
 23 890–91 (1935)

24 Significantly, in the instant Motion, Defendants fail to even cite to any provision of the  
 25 Nevada Revised Statutes and/or Clark County Ordinances where any express procedure or remedy  
 26 is created for the recovery of money/taxes for transient lodging collected by Defendants but not  
 27 paid to Clark County. Defendants have failed to identify the remedy provided by any statute or  
 28

1 ordinance that it claims exclusively preempts all other statutory or common law actions/remedies  
2 merely because the subject matter relates to unpaid transient lodging taxes. Further, upon review  
3 of the provisions of Chapter 4.08 of the Clark County Ordinances, there is no provision which  
4 expressly or by necessary implication indicates a legislative intent to abrogate common law actions  
5 and remedies or other statutory actions or remedies like the Plaintiffs Seventh Claim for Relief for  
6 violation of Nevada's Deceptive Trade Practices Act. There is simply no authority standing for  
7 the proposition that Chapter 4.08 of the Clark County Ordinances abrogates or could abrogate the  
8 rights and remedies set forth in NRS Chapter 598 provided to a proper plaintiff for Defendants'  
9 violation of the Nevada Deceptive Trade Practices Act.  
10

11 Further, the interpretation of the exclusive remedies doctrine advanced by Defendants  
12 would render meaningless certain provisions of Clark County Ordinances Chapter 4.08. As set  
13 forth in more detail in Section IV hereof, Chapter 4.08.055(b) establishes that the taxes collected  
14 by Defendants "are public monies from the moment of their collection" and are held in trust for  
15 the benefit of Clark County by the Defendants. There would be no reason whatsoever for the  
16 ordinance to define the operator collecting the taxes from the consumer as a trustee over public  
17 funds unless Clark County could seek collection of such monies from the operator under common  
18 law theories derived from the trust relationship, as for instance conversion and breach of fiduciary  
19 duties. Yet, Defendants nonsensically argue that such common law remedies based upon legal  
20 relationships created by statute are foreclosed by the very statute which creates the legal  
21 relationship itself.  
22  
23

24 Defendants' broad application of the exclusive remedies doctrine leads to further absurd  
25 conclusions which can best be highlighted by analogy. In or about 1987, the Nevada legislature  
26 adopted the Uniform Securities Act. Therein, they created a new statutory private right of action  
27 and a private remedy for securities fraud as defined in the Uniform Securities Act in NRS 90.660.  
28

Under Defendants' interpretation of the exclusive remedies doctrine, the creation of a new action and remedy for Securities Fraud necessarily abrogated a person's ability to proceed with common law claims in any case where the subject matter related to alleged securities fraud under NRS Chapter 90. Yet, as this Court has no doubt experienced itself, complaints alleging securities fraud under NRS Chapter 90 routinely include other claims as for instance for securities fraud under federal law, common law fraud, breach of fiduciary duty, conversion and the like. It is difficult to fathom any defendant subject to a securities fraud claim under NRS Chapter 90 arguing that the exclusive remedies doctrine abrogated all common law or other statutory claims because the subject matter related to securities fraud and NRS 90.660 set forth a remedy therefore which must be construed as the exclusive and only remedy available.

Plaintiff has plead both common law and statutory rights of action in compliance with Rule 8 of the Federal Rules of Civil Procedure. They are not barred by the exclusive remedies doctrine as asserted by Defendants.

### III.

#### PLAINTIFF'S DECEPTIVE TRADE PRACTICE CLAIM IS PROPERLY PLED

##### A. Plaintiff Has Standing Under NRS Chapter 598 and NRS 41.600.

NRS 41.600 provides, in relevant part, as follows:

##### **NRS 41.600 Actions by victims of fraud.**

1. An action may be brought by any person who is a victim of consumer fraud.
2. As used in this section, "consumer fraud" means: ...
  - (e) A deceptive trade practice as defined in NRS 598.0915 to 598.0925, inclusive.

This Court has previously considered what elements the Nevada Supreme Court would require for a private NDTPA claim for damages. See *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 657–58 (D. Nev. 2009) cited by Defendants in their Motion. "(T)he Nevada Supreme Court would require, at a minimum, a victim of consumer fraud to prove that (1) an act of consumer fraud by the defendant (2) caused (3) damage to the plaintiff. *Id.*

1 Contrary to Defendants' claims, *Picus*, supra., does not require a demonstration of reliance  
2 by Plaintiff on the alleged act of consumer fraud. Rather, *Picus*, supra., requires the element of  
3 reliance when the basis for the consumer fraud alleged is a false representation made to the Plaintiff  
4 by Defendants. However, in this case, Plaintiff herein is not the consumer who purchased the  
5 transient lodging from Defendants.

6  
7 The central thrust of Defendants' standing argument is that "Plaintiff cannot be a victim of  
8 these alleged practices of Defendants because the complained of conduct was not directed toward  
9 Plaintiff." [Motion at 7:3-4]. However, the argument is based upon the faulty premise advanced  
10 by Defendants that only parties to the relevant consumer transactions (i.e. (1) travelers, (2)  
11 Defendants, and (3) hotel operators physically located within Clark County) are proper plaintiffs  
12 in an NDTPA claim. [Motion at 7:6-10].

13  
14 *Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145, 1152–53 (9th Cir. 2011),  
15 another case cited by Defendants in their Motion, clearly establishes the standing requirements for  
16 a plaintiff to maintain an NDTPA action. As noted therein, NRS 41.600(1) provides that "[a]n  
17 action may be brought by any person who is a victim of consumer fraud." *Id.* quoting *Nev. Power*  
18 *Co. v. District Court*, 120 Nev. 948, 102 P.3d 578, 583 n. 7 (2004) (per curiam). A "victim of  
19 consumer fraud" need not be a "consumer" of the defendant's goods or services. See *Del Webb*  
20 *Communities, Inc.*, supra., citing *See S. Serv. Corp. v. Excel Bldg. Servs.*, 617 F.Supp.2d 1097,  
21 1100 (D.Nev.2007) (allowing a business competitor to sue under NRS 41.600).

22  
23 Here, the Complaint expressly alleges that Defendants have engaged in an act of consumer  
24 fraud. [Complaint [ECF 1-1] at para.s 87-92]. The Complaint also sufficiently alleges both  
25 causation and damages. [Complaint at para.s 92 and 93]. The Complaint further alleges that the  
26 means and methods by which Plaintiff is a victim of consumer fraud is that the business model  
27 itself utilized by each and every Defendant "deprives Nevada taxing authorities, including the  
28 County, of taxes

1 due them on the full value of the transaction whereby a consumer obtains transient lodging in a  
 2 hotel.” [Complaint at para. 3].

3 3. For example, an online travel company such as Travelocity, Inc. obtains a room  
 4 from a hotel at a previously negotiated wholesale price of, for instance \$150.  
 5 Travelocity, Inc. in turn sells that same hotel room to an occupant over the internet  
 6 for \$200. In this example, Travelocity, Inc. remits to the hotel the discount wholesale  
 7 amount (\$150) plus the occupancy tax calculated based upon the \$150 discounted  
 8 wholesale rate rather than on the \$200 retail rate charged to the consumer. The hotel  
 9 submits the tax on the \$150 discounted wholesale rate to appropriate Nevada taxing  
 10 authorities, including the County. Travelocity retains the \$50 difference between the  
 11 discounted wholesale rate (\$150) and the retail rate charged to consumers (\$200) plus  
 12 any taxes and fees collected thereon. This business model deprives Nevada taxing  
 13 authorities, including the County, of taxes due them on the full value of the  
 14 transaction whereby a consumer obtains transient lodging in a hotel.  
 15 Complaint at para. 3.

16 The allegations of the Complaint therefore clearly set forth Plaintiff’s standing to pursue  
 17 its claims under the NDTPA.

#### 18 **B. Plaintiff Has Satisfied Rule 9(b)**

19 Plaintiff has satisfied the pleading requirements set forth in FRCivP 9(b). Said Rule  
 20 provides as follows:

21 (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a  
 22 party must state with particularity the circumstances constituting fraud or mistake.  
 23 Malice, intent, knowledge, and other conditions of a person's mind may be alleged  
 24 generally.

25 The degree of particularity required in any given case must necessarily be determined with  
 26 reference to the type, nature and scope of the fraud alleged. “To comply with Rule 9(b), allegations  
 27 of fraud must be specific enough to give defendants notice of the particular misconduct which is  
 28 alleged to constitute the fraud charged so that they can defend against the charge and not just deny  
 that they have done anything wrong.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007)  
 quoting *Bly–Magee v. California*, 236 F.3d 1014, 1019 (9th Cir.2001). In the context of a fraud  
 suit involving multiple defendants as in the instant matter, Plaintiff must, at a minimum, “identif[y]  
 the role of [each] defendant[ ] in the alleged fraudulent scheme.” *Swartz v. KPMG LLP*, supra.,  
 quoting *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir.1989).



1           The fraud claim in this case involves “consumer fraud” for engagement in deceptive trade  
2 practices defined in the NDTPA (NRS Chapter 598) by each Defendant. Plaintiff alleges that the  
3 fraud is a systemic one that arises directly out of the business model adopted by each of the  
4 Defendants in selling transient lodging to consumers over the internet. Paragraphs 1 through 3 of  
5 the Complaint particularly describe the business model employed by Defendants, and each of  
6 them, and how it is utilized to perpetuate consumer fraud and harm Plaintiff by denying it of duly  
7 collected tax revenues to which Plaintiff is entitled.

8  
9           Paragraph 1 of the Complaint alleges that each of the Defendants are “web-  
10 based hotel booking companies, who have knowingly engaged in a common practice/scheme to  
11 avoid payment of Nevada’s and Clark County’s Combined Transient Lodging Tax as required by  
12 Nevada law. Paragraph 2 particularly describes the business model wherein Defendants (a)  
13 purchase rooms from hotels at discounted/wholesale prices; (b) sell the rooms over the internet to  
14 consumers at marked up retail prices together with certain “tax recovery and fees;” (c) charge  
15 consumer credit cards for the full retail price of the room and amounts sufficient to pay occupancy  
16 taxes on the retail price of the rooms; and, (d) are invoiced by the hotels for only the  
17 wholesale/discount rate plus taxes calculated on the wholesale/discount rate rather than the full  
18 retail rate charged to consumers. Paragraph 3 of the Complaint alleges a particularized example  
19 of how the “business model deprives Nevada taxing authorities, including the County, of taxes due  
20 them on the full value of the transaction whereby a consumer obtains transient lodging in a hotel.”  
21  
22

23           As to each Defendants’ role in participating in the fraud, in addition to alleging that each  
24 Defendant utilizes the business model described in paragraphs 1-3 of the Complaint, the Complaint  
25 further alleges as follows:

- 26           1. “Defendants, and each of them, are ‘managing agents of any type or character’ of the  
27 operator/proprietor and have the same duties and liabilities as the operator/proprietor  
28

1 in collecting and remitting the Combined Transient Lodging Tax to Clark County”  
2 (Complaint at para. 37); and,

- 3 2. “Defendants, and each of them, exercise judgment and discretion in performing the  
4 functions of an operator in connection with, among other things, advertising and  
5 marketing of the rooms to transient guests, the amount of rent and other fees to be  
6 charged to the transient guests, refund and cancellation policies applicable to the  
7 transaction and securing reservations and payment therefore from the transient guests.  
8 In fact, from initiation of first contact with the transient guest through completion of  
9 the taxable sale/rental transaction, the operator/proprietor is not engaged in the  
10 transaction with the transient guest at all and all policies and procedures applied to the  
11 transaction are within the control and discretion of Defendants” (Complaint at para.  
12 38);  
13  
14 3. “The Defendants charge and collect from transient guests the Combined Transient  
15 Lodging Tax calculated as a percentage of the full retail price Defendants charge  
16 transient guests for their rooms” (Complaint at para. 40);  
17  
18 4. “Defendants have been remitting to operators/proprietors only that portion of the  
19 Combined Transient Lodging Tax which was calculated as a percentage of the  
20 discounted wholesale price Defendants pay to operators/proprietors” (Complaint at  
21 para. 43);  
22  
23 5. “Operators/proprietors have remitted to Clark County only that portion of the  
24 Combined Transient Lodging Tax they have received from Defendants which was  
25 calculated as a percentage of the discounted wholesale price Defendants pay to  
26 operators/proprietors” (Complaint at para. 44);  
27  
28

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1           6. “Defendants directly remit no Combined Transient Lodging Tax to Clark County in  
2           connection with the sale or rental of transient lodging in transient lodging  
3           establishments to transient guests” (Complaint at para. 45).

4           The Complaint then sets forth how the above and foregoing constitutes “consumer fraud”  
5           and is actionable under NDTPA. Paragraph 88 alleges that the business model “falsely reports to  
6           Clark County and other governmental bodies collecting a Combined Transient Lodging Tax that  
7           the ‘Rent’ is the discounted wholesale amount charged to Defendants by the operator rather than  
8           the retail ‘Rent’ paid by transient guests. Paragraph 90 alleges that “(i)n lumping taxes together  
9           in a single line item with taxes and other fees, Defendants disguise from both government bodies,  
10          including Clark County, and Defendants’ customers the actual amount of room taxes the customer  
11          is paying for. Said practice also disguises the amount and nature of the additional fees being  
12          charged.” The Complaint then ties the alleged fraud all together by alleging that the above and  
13          foregoing constitutes a deceptive trade practice in that the business model involves “the making of  
14          misleading statements of fact concerning the price of goods or services for sale or lease, or the  
15          reasons for, existence of or amounts of price reductions pursuant to NRS 598.0915(13) and/or (b)  
16          knowingly making any other false representation in a transaction pursuant to NRS 598.0915(15).”  
17          (Complaint at para. 92).

18           It can hardly be said that the allegations are not “specific enough to give defendants notice  
19           of the particular misconduct which is alleged to constitute the fraud charged so that they can defend  
20           against the charge.” Nor can it credibly be asserted that the Complaint fails to identify the role of  
21           each defendant in the alleged fraudulent scheme.

22           What Plaintiff has concededly not done is allege a specific time frame in which the  
23           Defendants have utilized the business model alleged to be false and deceptive or the date of each  
24           consumer transaction completed pursuant to the business model utilized by each Defendant. Those  
25

1 facts are uniquely and wholly within the knowledge of each of the Defendants. Instead, Plaintiff  
 2 has alleged that the Defendants are using the fraudulent business model and have been utilizing it  
 3 “for a period of time presently unknown to Plaintiff.” [Complaint at para. 46].

4 Pursuant to *Rocker v. KPMG, LLP*, 122 Nev. 1185, 148 P.3d 703 (2006), which was  
 5 applicable to the Complaint as filed in the Eighth Judicial District Court, Plaintiff is entitled to a  
 6 relaxed pleadings standard because many of the material facts are particularly within the knowledge  
 7 of the Defendants and Plaintiff should be allowed time to conduct necessary discovery. The Ninth  
 8 Circuit similarly recognizes a relaxed pleading standard when facts constituting the circumstances  
 9 of the alleged fraud are peculiarly within the defendant's knowledge or are readily obtainable by  
 10 him. *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993). Provided that a complaint identifies  
 11 “the circumstances constituting fraud so that the defendant can prepare an adequate answer from  
 12 the allegations,” it is sufficient. *Gottreich v. San Francisco Investment Corp.*, 552 F.2d 866, 866  
 13 (9th Cir.1977).  
 14  
 15

16 In the event this Court determines more particularity is required, Plaintiff asks for leave to  
 17 amend to add allegations on information and belief that satisfy Rule 9(b).

### 18 **C. Reliance is Not Required for Plaintiff's NDTPA Claim.**

19 *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 657–58 (D. Nev. 2009) analyzed the  
 20 question of whether reliance is a required element for all NDTPA claims. Therein, the court found  
 21 that, pursuant to Oregon law, causation requires proof of the consumer's reliance-in-fact when an  
 22 alleged violation is an affirmative misrepresentation where the plaintiff claims to have acted upon  
 23 a seller's express representations, as opposed to a failure to disclose. *Id.* Similarly, the court noted  
 24 that California similarly requires a plaintiff suing for misrepresentations in connection with a sale  
 25 to “prove she relied on a material misrepresentation.” *Id.* The court further stated that “while  
 26 Illinois does not require actual reliance, a plaintiff must show proximate causation, i.e., that she  
 27 was in some manner deceived.” *Id.*  
 28



1 Defendants' analysis wholly ignores Clark County Ordinance 4.08.055(b) which provides  
2 as follows:

3 (b) Combined transient lodging taxes collected by the operator are public monies  
4 from the moment of their collection and shall be held in trust by the operator  
5 collecting such taxes for the use and benefit of the agencies for whom such  
revenues are collected.

6 By operation of law, the unpaid taxes are public monies belonging to Plaintiff at the  
7 moment of their collection. By operation of law, those monies are held in trust by Defendants for  
8 the use and benefit of Plaintiff. The unpaid taxes are not a general debt of Defendants arising out  
9 of a creditor-debtor relationship.

10 Paragraph 62 of the Complaint alleges that the "Plaintiff has the right to the immediate  
11 possession of the money representing the taxes due and owing" from, at least, "the date the  
12 Combined Transient Lodging Tax is due and payable to Clark County." Paragraph 63 of the  
13 Complaint alleges that "Defendants wrongfully exercised dominion and control over the monies  
14 belonging to Clark County thereby depriving Plaintiff of the use and the benefit thereof."  
15 Clearly, as monies belonging to Clark County at the moment of its collection which are held in  
16 trust by Defendants, Plaintiff's conversion claim adequately sets forth the required elements for  
17 this cause of action under common law. This is fully consistent with Clark County Ordinance  
18 4.08.055(b).  
19  
20

## 21 V.

### 22 PLAINTIFF'S BREACH OF FIDUCIARY DUTY CLAIM IS APPROPRIATE

23 Defendants arguments regarding Plaintiff's claim for breach of fiduciary duty fail for  
24 reasons similar to Defendants' arguments regarding conversion. Defendants argue that no  
25 fiduciary duty generally exists between a taxpayer and the tax collecting agency. The case they  
26 cite, *Franchise Tax Bd. of Cal. v. Hyatt*, 130 Nev. 662, 689, 335 P.3d 125, 143 (2014), does not  
27 support that broad proposition. Therein, the taxpayer claimed that the government owed the  
28 taxpayer a fiduciary duty which argument was rejected.

1 Even if, as a general rule, a taxpayer owes no fiduciary duty to the government tax  
2 collecting agency for taxes owed, that rule is not applicable in this case. Here, Plaintiff is not  
3 claiming that Defendants owe fiduciary duties to Plaintiff by virtue of any status of Defendants as  
4 “taxpayers.” Rather, Defendants owe fiduciary duties to Plaintiff because Defendants are  
5 “trustees” of public monies belonging to Plaintiff.  
6

7 Generally, a trustee owes a fiduciary duty to a trust's beneficiaries and is obligated  
8 to carry out the trust according to its terms and to act with the highest degrees of  
9 fidelity and utmost good faith. *Dick v. Peoples Mid-Illinois Corp.*, 242 Ill.App.3d  
10 297, 182 Ill.Dec. 463, 609 N.E.2d 997 (1993). Further, a trustee owes a fiduciary  
11 duty to serve the interest of the beneficiaries with total loyalty, excluding all self-  
12 interest, and is prohibited from dealing with the trust's property for her individual  
13 benefit. *Dick*, 242 Ill.App.3d at 303–04, 182 Ill.Dec. 463, 609 N.E.2d 997.

14 *Giagnorio v. Emmett C. Torkelson Tr.*, 292 Ill. App. 3d 318, 325, 686 N.E.2d 42,  
15 46 (1997)

16 Paragraph 68 of the Complaint alleges that the “Combined Transient Lodging Tax  
17 constitutes the money and property of Clark County.” This allegation is directly supported by the  
18 aforementioned Clark County Ordinance 4.08.055(b). Paragraph 69 alleges that “(i)n that  
19 Defendants are holding the money and property belonging to Clark County and have collected the  
20 tax due from its customers in the transient lodging transaction, Defendants stand in a fiduciary  
21 relationship with Clark County as to the amount of taxes due and owing and/or collected from its  
22 customers.”

23 In this matter, the consumer purchasing the hotel room from Defendants is the “taxpayer”  
24 who pays the Transient Lodging Tax. The consumer pays the tax to Defendants who are “trustees”  
25 of the monies paid by the consumer for the benefit of Plaintiff. As the trustee of the money,  
26 Defendants have a fiduciary duty to carry out the terms of the trust for the benefit of Plaintiff which  
27 includes paying the money to Plaintiff as directed by county ordinance.

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**VI.****PLAINTIFF’S UNJUST ENRICHMENT CLAIM IS PROPERLY PLEAD**

“Unjust enrichment occurs whenever a person has and retains a benefit which in equity and good conscience belongs to another.” *In re Amerco Derivative Litigation*, 252 P.3d 681 (2011) quoting *Nevada Industrial Dev. V. Beneditti*, 103 Nev. 360, 741 P.2d 802 (1987). This claim for relief incorporates all other allegations made in the Complaint which aver that Defendants, utilizing a fraudulent business model, deceive consumers and government taxing authorities regarding the nature and amount of Transient Lodging Taxes being charged and collected in a consumer transaction. They allege that Defendants collect the taxes which belong to Plaintiff and have retained them for Defendants own use and benefit. Paragraph 76 specifically alleges that “(i)n retaining and failing to remit the Combined Transient Lodging Tax as described herein, Defendants have obtained a benefit that in equity and good conscience they should not have obtained or possessed because the benefits rightfully belonged to Plaintiff.”

These allegations fully satisfy the requirements of FRCivP 8(a)(2) which only requires that the Complaint set forth “a short and plain statement of the claim showing that the pleader is entitled to relief.” While Defendants are free to try to establish that the alleged benefit is not a benefit at all through discovery and litigation, they are not free to do so on a motion to dismiss.

**VII.****PLAINTIFF’S CONSTRUCTIVE TRUST CLAIM SHOULD BE DISMISSED**

Plaintiff concedes that a constructive trust is a remedy rather than a stand-alone cause of action. In that Plaintiff has included imposition of a constructive trust as a remedy in its prayer for relief, assuming the Court finds it has subject matter jurisdiction over this case, this claim should be dismissed as an independent cause of action but should remain as a requested remedy.

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**IV.**

**CONCLUSION**

For the above and foregoing reasons, Defendants' Motion to Dismiss should be denied in its entirety because the Court lacks subject matter jurisdiction of the matter. Assuming the Court finds it has subject matter jurisdiction over this case, the Motion should be denied as to all claims for relief except for the claim for constructive trust. Constructive trust will still be a viable remedy as prayed for but is not a standalone cause of action.

Respectfully submitted this 4th day of October 2021.

**CLARK HILL PLLC**

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 4th day of October 2021, I served a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS** via the Court's electronic filing system only, pursuant to the Nevada Electronic Filing and conversion Rules, Administrative Order 14-2, to all parties currently on the electronic service list.

/s/ Tanya Bain

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An Employee of Clark Hill, PLLC